

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 24, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1161

Cir. Ct. No. 2008CF60

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT D. FERNANDEZ CLOSE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Pierce County: JAMES J. DUVALL, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Robert Close appeals a judgment of conviction for aggravated battery with a dangerous weapon and an order denying his post-conviction motion for resentencing. Close argues he was sentenced based on

inaccurate information in violation of his due process rights. We reject Close's arguments and affirm.

BACKGROUND

¶2 Close has a substantial criminal history, much of which must be set forth to fully address the issues on appeal. In Pierce County case Nos. 2004CF127 and 2004CM219, Close was convicted of possession of THC with intent to deliver and disorderly conduct, respectively. In Pierce County case No. 2004CF165, Close was convicted of fourth-degree sexual assault, with a second-degree sexual assault of a child charge deferred pursuant to an agreement with the State. Close was placed on probation for each of these crimes, and was subsequently revoked based upon a number of violations, including a battery for which Close was convicted in St. Croix County case No. 2005CF470. The deferred prosecution agreement in 2004CF165 was also revoked, and Close was sentenced to two years' initial confinement and two years' extended supervision for second-degree sexual assault of a child.

¶3 Close was released from prison and placed on extended supervision on September 4, 2007. The charge in the present case arose from an incident on May 17, 2008, in which Close stabbed a man with a knife following an argument in a bar. Pursuant to a plea agreement, Close pled guilty to aggravated battery with a dangerous weapon enhancer. He was sentenced to fifteen years' imprisonment, consisting of ten years' initial confinement followed by five years' extended supervision.

¶4 Close filed a timely notice of intent to pursue post-conviction relief. The State Public Defender appointed counsel to represent Close in post-conviction proceedings. After reviewing the record and transcripts and conferring with

Close, appointed counsel filed a no-merit report with this court. The next day, Close requested that counsel withdraw the report and expressed a desire to represent himself in post-conviction proceedings. Close subsequently filed what we construed as a motion to voluntarily dismiss his appeal, and we ordered the appeal dismissed.

¶5 Close, pro se, subsequently filed a “Notice of Motion and Motion for Sentence Modification.” He asserted the trial court sentenced him based on five pieces of erroneous information, resulting in a sentence that was longer than necessary to accomplish the court’s sentencing objectives. The circuit court construed this motion as a request for sentence modification under WIS. STAT. § 973.19(1)(a), and determined the motion was untimely.¹ Because Close failed to present a good reason for failing to file within the allotted period, the court refused to consider the motion.

¶6 Close then filed a WIS. STAT. § 974.06 motion for post-conviction relief. He alleged the court sentenced him based on the following inaccurate information:

- The court erroneously believed Close continued to have contact with underage females while on extended supervision;
- The court erroneously believed Close’s deferred prosecution agreement had yet to be revoked on the night of the stabbing, and Close had forty years’ incarceration hanging over his head;
- The court erroneously believed Close had previously choked a juvenile male into unconsciousness in 2005CF470;
- The court erroneously believed Close was using his childhood as an excuse for his criminal behavior.

¹ All references to the Wisconsin Statutes are to the 2011-12 version.

Citing extensively from the sentencing transcript, Close argued the court gave explicit attention or specific consideration to each piece of allegedly inaccurate information, and he requested resentencing.

¶7 The circuit court entered a written order denying Close’s WIS. STAT. § 974.06 motion. It reasoned Close was required, but failed, to raise the issue in his direct appeal pursuant to *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and *State v. Lo*, 2003 WI 107, 264 Wis. 2d 1, 665 N.W.2d 756. Nonetheless, it chose to make “several comments” on the merits of Close’s arguments. The court stated any erroneous information regarding Close’s contact with underage females or the status of the deferred prosecution agreement would “not have materially affected the sentence pronounced.” The court also stated Close failed to show its statement regarding the choking incident or its observations about the negative aspects of Close’s early life were in error. Finally, it observed it had considered many factors in reaching its sentencing decision:

I considered the sentencing objective of punishment, protection of the community, the impact on the victim, the PSI recommendation, the Defendant’s prior record, the violent nature of the incident including the fact that the victim was stabbed 11 times, the Defendant’s age, lack of rehabilitation based on prior record, prior unsuccessful attempts at community supervision including revocation of probation, a chain of violent incidents dating back into childhood, the Defendant’s mental health, the Defendant[’]s history of controlled substance [offenses] and other factors as noted in the transcript.

Close appeals.

DISCUSSION

¶8 Briefing in this case was completed on December 16, 2013. The State originally asserted the arguments raised in Close’s WIS. STAT. § 974.06

motion were procedurally barred under *Escalona*, and it reserved the right to file a brief on the merits of the motion if we rejected its procedural arguments. *See State v. Tillman*, 2005 WI App 71, ¶13 n.4, 281 Wis. 2d 157, 696 N.W.2d 574. On January 24, 2014, we directed the State to file a supplemental brief addressing the merits. We observed that pursuant to *State v. Starks*, 2013 WI 69, 349 Wis. 2d 274, 833 N.W.2d 146; *State v. Lee*, 197 Wis. 2d 959, 542 N.W.2d 143 (1996); and *Loop v. State*, 65 Wis. 2d 499, 222 N.W.2d 694 (1974), it did not appear Close had waived his right to file a § 974.06 motion. The State withdraws its procedural argument in its supplemental brief, so we proceed to the merits.²

² The State’s supplemental brief presents two other arguments that do not merit specific attention in the body of this opinion. First, the State contends that because Close did not contest the accuracy of the court’s statements at sentencing, he has forfeited his right to claim he was sentenced based on inaccurate information. Second, the State contends the trial court’s order should be affirmed based on *State v. Witkowski*, 163 Wis. 2d 985, 473 N.W.2d 512 (Ct. App. 1991), because the arguments Close raised in his WIS. STAT. § 974.06 were the same as those he raised in his motion for sentence modification.

With respect to the State’s forfeiture argument, we observe that Close was represented by counsel at sentencing. The State’s forfeiture position would seemingly necessitate an ineffective assistance of counsel analysis, requiring remand for a post-conviction hearing. We need not embark on that journey when we can simply reach the merits of Close’s claim. *See State v. Groth*, 2002 WI App 299, ¶25, 258 Wis. 2d 889, 655 N.W.2d 163, *abrogated on other grounds by State v. Tiepelman*, 2006 WI 66, ¶31, 291 Wis. 2d 179, 717 N.W.2d 1.

We also reject the State’s reliance on *Witkowski*. Under *Witkowski*, 163 Wis. 2d at 990, “[a] matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.” However, the State’s concession that *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), does not apply based on *State v. Starks*, 2013 WI 69, 349 Wis. 2d 272, 833 N.W.2d 146, effectively forecloses it from advancing this argument as well. In *Starks*, 349 Wis. 2d 272, ¶49, our supreme court held that a defendant’s prior sentence modification motion “plainly does not waive a defendant’s right to bring a [WIS. STAT.] § 974.06 motion at a later date.” There is no indication from *Starks* that *Witkowski* operates as an exception to this rule. We also observe that the circuit court rejected Close’s motion for sentence modification because it was untimely and only in passing mentioned its merit.

¶9 “A defendant has a constitutionally protected due process right to be sentenced upon accurate information.” *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. A “sentence based upon materially untrue information, whether caused by carelessness or design, is inconsistent with due process of law and cannot stand.” *State v. Travis*, 2013 WI 38, ¶17, 347 Wis. 2d 142, 832 N.W.2d 491. Whether a defendant has been denied due process and sentenced on inaccurate information is a question of law we review de novo. *Tiepelman*, 291 Wis. 2d 179, ¶9.

¶10 A defendant who requests resentencing because of the circuit court’s use of inaccurate information must show both that the information was inaccurate and that the court actually relied on the inaccurate information during sentencing. *Travis*, 347 Wis. 2d 142, ¶26. Actual reliance is demonstrated if the circuit court gave “explicit attention” or “specific consideration” to the inaccurate information, such that the inaccurate information “formed part of the basis for the sentence.” *Id.*, ¶28. The defendant must prove both components by “clear and convincing evidence.” *State v. Payette*, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423.

¶11 “Once actual reliance on inaccurate information is shown, the burden then shifts to the state to prove the error was harmless.” *Tiepelman*, 291 Wis. 2d 179, ¶26. “An error is harmless if there is no reasonable probability that it contributed to the outcome.” *Payette*, 313 Wis. 2d 39, ¶46 (quoted source omitted); *see also State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985).

¶12 Close first argues the court erroneously believed he continued to have contact with underage females while on extended supervision. At sentencing, the court stated, “As far as your antisocial or risky thinking, you’re on

extended supervision for sexual assault of a child, and the probation—the [PSI] speaks of your continued contact with females under the age of 18 while on extended supervision, and a direct violation of that condition.” Close contends this statement was inaccurate because even though he acknowledges a single incident of contact in 2008 with a female under the age of eighteen, there is no evidence of *continued* contact or contact with more than one female.

¶13 We reject Close’s argument because he has not shown the court’s statement was inaccurate. Close has had continued contact with underage females, although that contact was not limited to his extended supervision. Close violated his probation in 2005 by contacting a fifteen-year-old girl and asking her and her companion, whom he subsequently choked, whether they would go drinking with him. While on extended supervision in 2008, he had unapproved contact with another minor female at a friend’s house. Consequently, the improper contact “continued” while Close was on extended supervision. To the extent Close argues the timing of the contact renders the court’s statement inaccurate, we cannot perceive how the timing could possibly have affected his sentence. The court’s point was that Close has continuously ignored conditions designed to keep him out of trouble.

¶14 Close next argues the sentencing court mistakenly believed that on the night of the stabbing, Close was facing a maximum of forty years’ incarceration for a prior offense. The court made the following observations at sentencing:

On the day that you walked into the bar you had a 40-year felony hanging over your head, on that you had had a deferred prosecution on that was revoked. So knowing that you had potentially 40 years['] exposure, you went into that bar. Why? To sell drugs. Armed with a knife.

....

I believe that you were consuming alcohol that night, which, I'm assuming, was a violation of probation. So that's the Robert Close that is walking into the bar ... and going into the park for a fight. A guy with 40 years hanging over his head.

In fact, Close had already had the deferred prosecution agreement revoked and been sentenced for second-degree sexual assault of a child, which is a Class C felony punishable by up to forty years' imprisonment. *See* WIS. STAT. §§ 948.02(2); 939.50(2)(c). The State concedes Close has shown by clear and convincing evidence that the court's statement was inaccurate, and the court actually relied on the inaccurate information.

¶15 However, we conclude the State has met its burden of showing that, in the context of the entire sentencing, the error was harmless. The court's inaccurate belief that Close had yet to be sentenced for second-degree sexual assault of a child at the time he committed the present offense was but one relatively trivial component of its total reasoning. The court first observed that this was "a very aggravated offense," during which Close used "an instrument designed to create great bodily harm" for that purpose. The court, partially rejecting the State's portrayal of the facts, painted the altercation as a voluntary fight between two participants, which Close ended by stabbing the victim eleven times, causing severe injuries. The court noted Close's extensive criminal history and "demonstrated failure of success in the community," including multiple probation or supervision revocations. It also emphasized the "substantial impact" to the victim and his family, which included two months off work, medical problems, and emotional turmoil. The court observed a "pattern of violence" dating back to Close's childhood. Before pronouncing the sentence, the court stated the primary sentencing factors were the gravity of the offense and protection

of the public, with the “lesser goal [being] rehabilitation ... because at this point you have failed so often on community supervision that I feel that the public needs to be protected until you have shown us that the steps which you say you have taken are long-term, permanent steps.” It is apparent the court considered a vast range of sentencing factors, and we conclude, on this record, the State has met its burden of showing the court’s erroneous belief that Close had not yet been sentenced for second-degree sexual assault of child was harmless beyond a reasonable doubt.

¶16 Next, Close asserts the court erroneously believed he choked a young juvenile into unconsciousness in case No. 2005CF470. The court made the following observation at sentencing:

One of your extended supervisions was revoked for substantial battery causing great bodily harm. I think that was maybe the probation that resulted in your being sentenced to prison the first time, and that was the choking of a young juvenile into unconsciousness. Again, a violent incident which resulted in a revocation of your probation and your first period of time in jail.

The State concedes that the trial court’s statement “is inaccurate in that the person he choked into unconsciousness was not a ‘young juvenile’ but, rather, [an eighteen-year-old].”

¶17 However, the State argues, and we agree, that Close has failed to demonstrate the sentencing court actually relied on the inaccurate information. Nothing in the sentencing transcript remotely suggests the age of the victim in case No. 2005CF470 was of significance. Instead, the court’s concern was Close’s pattern of aggressive and antisocial conduct. This is apparent from the court’s concluding statement that the choking was another “violent incident,” and

its remark immediately afterward that “this pattern of violence and behavior appears to date back into your childhood.”

¶18 Finally, Close claims the court believed he was using his childhood as an excuse for his behavior as an adult. He relies on the following quote from the sentencing court:

You claimed to have been abused by your adoptive father, although your mother indicates that you weren’t.

I don’t know, but if there was victimization in your past ... you have not dealt with that. Being from the past, that would tend to increase the risk to society of your future behavior, and you had opportunities to deal with it in the past. If you haven’t and if that occurred, I feel bad for you because no child should go through that, but at some point as an adult it no longer serves as an excuse and you need to deal with that and find a way to avoid you victimizing other persons and continuing the chain.

Close reasons that he never claimed his past excused his bad behavior, and the court’s statement indicates it relied on inaccurate information that he had.

¶19 We think Close reads too much in a single thread of the court’s reasoning. The sentencing court never said Close was using his childhood as an excuse for his behavior as an adult. Rather, the court stated if Close’s claim of victimization during his childhood was true, it would not in any way justify his adult conduct causing harm to others. The court also appeared sympathetic to Close, stating it “felt bad because no child should go through that.” On the whole, we are not persuaded the court actually relied on inaccurate information.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

